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Supreme Court, U.S.
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No. 10-_____

In The
Supreme Court of the United States

John Steadman Nilsen,
Petitioner,

v.

State of California,
Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Correen Ferrentino
The Law Office of Correen Ferrentino
600 W. Santa Ana Blvd. Suite 925
Santa Ana, California 92701
(714) 973-2024
cori@ferrentinolaw.com

QUESTIONS PRESENTED

1

Since a Petition for Review in the California Supreme Court results in a decision on the merits, should this Court reconsider and/or limited the holding of *Ross v. Moffit*, 417 U.S. 600 (1974), holding that a criminally accused cannot be denied the Sixth Amendment right to counsel in his or her state petitions for discretionary review, where, as here, the issue arises in the context of the right to petition for such review, not the right to appointed counsel on such review?

2

Does a state prisoner whose counsel on first-tier review, fails to inform him that the decision on appeal has been filed until more than six months after his discretionary review (second tier) petition for review is due, and who falsely tells him that counsel has timely filed that petition, deprive him of effective assistance of counsel in direct appeal in violation of the Sixth and Fourteenth Amendments?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Nilsen respectfully petitions for a writ of certiorari to review the summary denial of his habeas corpus petition to the California Supreme Court requesting permission to file a belated petition for review of the decision of the California Court of Appeal affirming his criminal conviction for first degree murder and sentence of life without the possibility of parole because his appellate counsel rendered ineffective assistance on direct appeal.

OPINIONS BELOW

The California Supreme Court's denial of the habeas corpus petition without any citations or explanations is attached as Appendix A.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a). The order of the California Supreme Court was filed on May 20, 2010. This petition is filed within 90 days of the denial.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A jury convicted petitioner John Steadman Nilsen inter alia of first degree murder and found that the murder was committed during the commission of a robbery. Petitioner was sentenced to life without the possibility of parole. The California Court of Appeal affirmed in an unpublished opinion.

Thereafter a Petition for Review was not filed in the California Supreme Court, barring petitioner from challenging his conviction on collateral review in the federal courts, since the deadline for filing said review has passed and his constitutional claims remain unexhausted.[1]

The record below is clear that petitioner's appellate counsel, not petitioner, is responsible for the failure to exhaust petitioner's claims. In a sworn affidavit, appellate counsel attests that despite a request by petitioner, and knowledge that petitioner

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[1] The exhaustion requirement arises from 28 U.S.C. § 2254(b)(1)(A) which limits the availability of relief to cases where the applicant has exhausted state remedies or 28 U.S.C. § 2254(b)(1) "(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." Federal courts generally do not grant an application for relief under 28 U.S.C. § 2254 unless the applicant has exhausted the remedies available in the state courts. See *Coleman v. Thompson*, 501 U.S. 722, at 731. (Claims asserted in a petition under § 2254 are exhausted if the petitioner "fairly presented" the claims to each level of the state courts.)

ultimately wanted to seek federal habeas relief, he did not file a petition for review in the California Supreme Court. Nor did he notify petitioner, who was incarcerated, that he lost on direct appeal until almost eight months afterwards- long after the deadline for filing a petition had passed. Hence petitioner lost the opportunity to file the petition in a pro se capacity. (See Declaration of appellate counsel, Appendix B.)

When appellate counsel finally did write to petitioner informing him of the appellate court decision, he represented that the Petition for Rehearing and the Petition for Review he had promised to file, *had been filed*, and denied. In truth, counsel had not filed either. Furthermore, counsel provided petitioner the wrong date on which the Court of Appeal had affirmed his conviction, writing that the conviction was affirmed on September 22, 2008, rather than the correct date of June 30, 2008. Finally, counsel failed to provide a copy of the appellate opinion, further depriving petitioner of valuable information.

When retained to represent petitioner on direct appeal, counsel assured petitioner that he would "do everything I can to have your conviction reversed," including making sure the record was "preserved" for later review in federal court. In a letter to petitioner before the appellate court's decision, counsel wrote, "this issue cannot be raised in the appeal because it is not part of the record. However, it is a very good issue for habeas."

Counsel and petitioner discussed petitioner's desire to seek discretionary relief and in fact counsel

advised petitioner that some of his claims appeared to have merit. (Declaration of petitioner attached as Appendix C.) Despite all of this, counsel failed to file a petition for review or a petition to exhaust state remedies in the California Supreme Court.

Current counsel filed a habeas corpus petition in the California Supreme Court asking leave to file a belated petition for review because of appellate attorney's incompetence in failing to complete the tasks integral to his representation on direct review.

The California Supreme Court summarily denied petitioner's request to file a belated petition for review, without comment or citation.

REASONS FOR GRANTING THE WRIT

I. Since a Petition for Review in the California Supreme Court Results in a Decision on the Merits, This Court Should Reconsider And/or Limit *Ross v. Moffit*, 417 U.S. 600 (1974).

This court should grant petitioner's writ because although California did not state a reason for its denial of petitioner's writ in this case, presumably it was because of the dictates of Ross, which California is bound to follow.

In *Douglas v. California*, 372 U.S. 353, this Court held that in criminal proceedings a State must provide counsel for an indigent defendant in a first appeal as of right. This is true for two reasons: An appeal "of right' is an adjudication on the merits, *Id.*, at 357; and first-tier review differs from later appellate stages, *Id.*, at 356.

In *Ross v. Moffitt*, 417 U.S. 600, this Court concluded that a defendant has no constitutional right to counsel in pursuing a writ of certiorari in the United States Supreme Court. *Id.* at 617. By so holding, the Court concluded that states are under no obligation to appoint counsel for indigent defendants to seek discretionary state appeals or certiorari petitions. *Id.* at 617-18.

In *Wainwright v. Torna*, 455 U.S. 586, this Court held that a state criminal defendant has no constitutional right to the effective assistance of counsel when pursuing a discretionary state appeal., "Since respondent had no constitutional right to counsel," the Court observed, "he could not be deprived of the effective assistance of counsel . . . ." *Id.* at 587-88. The reasoning in *Torna* rests on a single proposition: if the state is not constitutionally required to provide a lawyer, the Constitution cannot place any constraints on that lawyer's performance. The four-paragraph opinion in *Torna* relies on only one authority, *Ross*.

This Court shed further light on the matter in *Halbert v. Michigan*, 545 US 605. The court ruled that counsel must be made available to a defendant on a first-tier discretionary appeal; at least where the discretion guiding grant or denial depends on the merits of the claim, rather than the importance of the question. *Id.* at 618.

In *Halbert*, an amendment to Michigan's constitution provided that a defendant who pled guilty or nolo contendere could appeal to the Michigan Court of Appeals only by leave of that court. 545 US 605, 609. Under Michigan law, a

defendant convicted by plea was required to file an application for leave to appeal with the Michigan Court of Appeals. *Halbert* at 612. The court then could "'grant or deny the application; enter a final decision; [or] grant other relief.'" *Id.* (quoting Mich. Ct. Rule 7.205(D)(2)). If the court granted the application, the case would proceed as an appeal of right. *Id.* The Michigan appeals court routinely cited "lack of merit in the grounds presented" as a reason for denying leave to appeal. *Id.* Michigan refused to allow appellate counsel to be appointed to indigent defendants for the purpose of seeking leave to appeal. *Id.* at 613.

The Supreme Court determined that defendants' rights to due process and equal protection were violated by Michigan's failure to provide for counsel for the purpose of seeking leave to appeal. *Halbert*, 545 US 605, 610-611. The Court reasoned that although the defendants were not entitled to an appeal as of right, they were "entitled to apply for leave to appeal." *Id.* at 617. "Of critical importance," the Court noted, was that "the tribunal to which [a defendant] addresses [his or her] application, the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction instance." *Id.* Accordingly, in determining whether to grant leave to appeal, the Michigan Court of Appeals necessarily considered "the merits of the applicant's claims." *Id.* at 619.

Michigan's Court of Appeals is guided by the merits of the particular defendant's claims presented in responding to leave to appeal applications, not by the general importance of the question. Therefore the

defendant is entitled to an attorney for purpose for seeking allowance of appeal. *Halbert*, 545 US 605, 623.

When a California Supreme Court denies a petition for review without citation or comment, it will be assumed that the state Supreme Court has been given a fair opportunity to review the merits of the petitioner's state habeas claim. *Roman v. Estelle* (9th cir 1990) 917 F2d 1505. (See also *Gaston v. Palmer*, 417 F.3d 1030, 1038 (9th Cir. 2005), *as amended by* 447 F.3d 1165 (9th Cir. 2006) ("We construe 'postcard' denials such as these to be decisions on the merits"); *Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); See also Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 USC §2854 (b). Therefore, under the reasoning of *Halbert*, a defendant is entitled to an attorney and effective assistance when filing a Petition for Review. Petitioner was denied this here.

A denial of petition for review means the issues were fairly presented and denied on the merits. It is a petition seeking to correct the record. Since a denial of a Petition for Review in the California Supreme Court is a ruling on the merits, it is a conclusion no error occurred and therefore this review is not discretionary.

If a defendant must obtain a decision on the merits to exhaust constitutional claims brought in a federal petition for writ of habeas corpus, then he is entitled to counsel and effective assistance in the petition for review process.

Petitioner was entitled to counsel and counsel rendered ineffective assistance for failing to file a petition for review to exhaust state remedies as promised. To support a claim for ineffective assistance of counsel, petitioner must prove both the objectively deficient performance of his counsel and prejudice. *Strickland v. Washington*, 466 U.S. 668. This applies equally to appellate counsel. Roe v. Flores-Ortega, 528 U.S. 470.

Here, there could have been no strategic reason to not file a Petition for Review. Counsel admits in his declaration he failed to file a Petition for Review despite being asked to do so by his client, knowing his client wanted to seek federal relief and misrepresenting to his client that he had done so after it was too late for petitioner to file it on his own.

Accordingly, petitioner should be granted his relief requested so that he can file a belated Petition her review in the California Supreme Court.

II. A State Prisoner, Whose Counsel on First-Tier Review Fails to Inform Him that the Decision on Appeal Has Been Filed Until More Than Six Months After His Discretionary Review (Second Tier) Petition for Review Is Due, and Who Falsely Tells Him That Counsel Has Timely Filed That Petition, Deprived Him of Effective Assistance of Counsel in Direct Appeal in Violation of the Sixth and Fourteenth Amendments.

A criminal defendant on direct appellate review is guaranteed effective assistance of appellate counsel. *Roe v. Flores-Ortega*, 528 U.S. 470;

Strickland v. Washington, 466 U.S. 668. Under this duty, counsel should be required, at a minimum, to timely notify his incarcerated client regarding the decision of the appellate court and provide a copy of the decision so that his client can pursue a Petition for Review pro per or seek counsel to do so. Here, appellate counsel did not inform petitioner, who was incarcerated, that he lost on direct appeal until almost eight months afterwards- long after the deadline for filing a petition had passed. Hence petitioner lost the opportunity to file the petition in a pro se capacity. Further, when appellate counsel finally did write to petitioner informing him of the appellate court decision, he represented that the Petition for Rehearing and the Petition for Review he had promised to file, *had been filed*, and denied. In truth, counsel had not filed either.

It is petitioner's position that his appellate counsel was constitutionally obligated under his first-tier obligations as appellate counsel to file the Petition for Review and protect petitioner's ability to seek later review in the federal courts. Something he advised his attorney he wanted to do. If this Court disagrees, petitioner still should get relief since his counsel failed in his responsibilities as appellate counsel to timely and accurately notify petitioner so that he could file a Petition for Review on his own. In this regard, Nilsen is not seeking to establish a right to an effective, court appointed counsel to file a Petition for Review, but a right to counsel on direct appeal (first-tier, DCA) sufficient to enable him to file his own petition. If this is not the law, then petitioner, and others similarly situated, is in an

untenable position. It is impossible for them to file a Petition for Review in the state court, a necessary precursor to obtaining later federal review.

In *Wainwright v. Torna*, 455 U.S. 586, the Supreme Court said, per curiam, since petitioner had no constitutional right to counsel to pursue discretionary review by the Florida Supreme Court, he could not, ipso facto, be deprived of effective assistance of counsel by his retained counsel's failure to timely file application for certiorari. The court's opinion was based solely on *Ross*.

The rationale of *Ross* was that with adequate assistance of counsel in the first-tier state review, the defendant would have enough to go forward on his own. A defendant who had already benefited from counsel's aid in a first-tier appeal as of right would have, "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review." *Ross*, 417 U.S. 600, 615.

Here, of course the *Ross* reasoning does not apply since petitioner did not have knowledge of the decision, transcripts or even the court of appeal opinion to go forth on his own. Moreover, even if he did have such items, he was precluded from filing a

Petition for Review because by the time he was notified the deadline to file had long passed.

Appellate counsel failed in his obligations to petitioner in direct first-tier appeal. As a result, petitioner did not get his Petition for Review in the California Supreme Court. In *Sims v. State*, 998 So.2d 494 (Fla SupCt 2008) the petitioner contended that his attorney did not properly supply him with a copy of the decision below or keep him apprised of the case status, which precluded him from filing a timely pro se petition for discretionary review. The Florida Supreme Court held was denied effective assistance of counsel based on his counsel's failure to notify him that his appeal had been denied and that he had a right to file for discretionary review. See also *Harrington v. Gillis*, 456 F.3d 118 (3rd Cir. 2006) [applying *Roe v. Flores-Ortega*, 528 U.S. 470]. Other cases supporting this view and/or the view that where the state allows the application as of right, the defendant should be entitled to effective assistance of counsel in making that application are: *Shiloh-Bryant v. Director*, 104 F.Supp.2d 696 (ED TX 2000) [Holding: Petitioner was denied effective assistance of counsel based on his counsel's failure to notify him that his appeal had been denied and that he had a right to file for discretionary review.]

It is axiomatic that an appellate attorney is obligated to timely apprise his client of the result of the appeal.

Appellate counsel must maintain an obligation of effective representation to his client at least until

the decision of the appellate court is rendered and that decision is transmitted to the defendant.

An attorney is obligated to apprise his client of the opinion and has ongoing duties and obligations once the appeal is filed. For example, appellate counsel's failure to file a petition for rehearing deprives a defendant of a critical stage of the direct appeal, allowing the correction of facts misstated by the court of appeal decision.

In *Roe v. Flores-Ortega*, 528 U.S. 470, this court held that the proper framework for evaluating a claim that counsel was ineffective on appeal is governed by *Strickland v. Washington*, 466 U.S. 668 (See Issue I, ante.).

This court is urged to find that on the facts of this case, counsel's failures are properly characterized as advice in his continuing role as direct appellate counsel, not certiorari counsel. As such, petitioner was deprived of effective assistance of counsel since he has a constitutional right to have his attorney properly carry out his obligations on direct appeal by making sure petitioner's adequately apprised of the critical stages of the first-tier appellate process. This must be part and parcel of counsel's duties on direct appeal because the consequences of his failure to do this are dire. In this case, it has deprived petitioner of his right to have his issues exhausted in state court so that he can pursue federal habeas relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Correen Ferrentino
The Law Office of Correen Ferrentino
600 W. Santa Ana Blvd., Suite 925
Santa Ana, California 92701
(714) 973-2024

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